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# In the Supreme Court of the United States

**October Term, 1982**

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
*Petitioner,*

vs.

WOLD ENGINEERING, P.C., AND SCHMIDT, SMITH & RUSH, P.C.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

## OBJECTION OF RESPONDENT, WOLD ENGINEERING TO MOTION FOR LEAVE TO FILE BRIEF OF STANDING ROCK SIOUX TRIBE, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, AND SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AS AMICUS CURIAE

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## I. QUESTIONS PRESENTED

1. Whether Amicus briefs should be filed if the interests and position advanced by the amicus will not aid the court in reaching resolution of the issue presented.
2. Whether an Indian tribe has standing to object to the jurisdictional consequences the tribe created for itself.

## II. PARTIES TO THE PROCEEDINGS

1. Three Affiliated Tribes of the Fort Berthold Reservation, Petitioners.
2. Wold Engineering, P.C.; and Schmidt, Smith & Rush, P.C., Respondents.
3. The United States of America; Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation, and Shoshone Tribe of the Wind River Reservation; and Turtle Mountain Chippewa Tribe, and Native American Rights Fund, as Amicus Curiae.

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## V. JURISDICTIONAL STATEMENT

Standing Rock files this Motion pursuant to Rule 36.3, United States Supreme Court Rules, for leave to file a brief as amicus curiae. Wold respectfully submits this reply brief.

## VI. STATEMENT OF THE CASE

On May 26, 1983, Standing Rock Sioux Tribe, and other Indian tribes, hereafter referred to as "Standing Rock", requested permission from Wold Engineering to file a brief as amicus curiae in support of Petitioner. Respondent, Wold Engineering, hereafter referred to as "Wold", asked Standing Rock to justify to Wold its reasons for filing. Standing Rock submitted to Wold a statement that its tribal members would be affected by the Supreme Court's decision in this case. Further, Standing Rock submitted that as a matter of professional courtesy permission to file amicus briefs is freely given. Wold determined that the reasons stated by Standing Rock were insufficient to justify the filing of amicus briefs and therefore withheld its consent.

Standing Rock now makes its Motion, and has filed a supporting brief for permission of this Court to file. Wold objects to this Motion.

## VII. SUMMARY OF THE ARGUMENT

The law does not suffer the performance of useless acts. An amicus curiae, and all parties should strive to limit the filing of briefs and other papers to those briefs and papers which will aid the Court in the determination of issues. If an amicus cannot satisfy this standard, and adds no new insights into the decision making process, the

brief should not be filed. Leave to file a brief which does not advance the determination of issues should not be granted.

Neither a party, nor amicus, may object to the consequences it created as a result of its own actions. When statements and representations are made, and those statements cause others to act in reliance thereon, the party making those statements and representations may not object to the consequences which flow therefrom. Fair play and tradition dictate that persons live within the legal conditions their actions have created. Leave to file a brief which objects to the consequences an amicus's own actions have created should not be granted.

## VIII. ARGUMENT

### A. If an amicus curiae brief will not aid the Court in reaching a decision on the questions presented in the case, the filing of an amicus brief is a useless act, and permission to file should be denied.

Rule 36.3, United States Supreme Court Rules, requires a person seeking permission to file a brief as amicus curiae show this Court the nature of the applicant's interests; the facts and questions of law that have not been, or reasons for believing they will not be, adequately presented by the parties; and the relevancy of those facts to the case. When Standing Rock first asked Wold's permission to file as amicus, Wold asked Standing Rock to justify, under Rule 36.3 standards, its role as amicus. Standing Rock replied to this query by stating that as an Indian tribe the decision in this case would affect it; that it had an interest in the outcome of the decision; and that as a matter of professional courtesy permission to file an amicus brief is normally granted.

Rule 36.3 contemplates that an amicus show to the Court concrete justification. Further, in his Memorandum Opinion in *Lee v. United States*, 343 U.S. 924 (1952) Justice Frankfurter wrote that amicus briefs should aid the Court in reaching its decision, and parties should consent to the amicus *if that aid is presented.*

When this Court speaks everyone, Indian and non-Indian alike, is immediately and significantly affected; this is the sole claim Standing Rock has asserted as its interest in this case. Wold asserted this is not justification for the filing of an amicus brief, and Wold therefore denied its permission to Standing Rock to file. In its Motion before this Court, Standing Rock has presented no justification.

Standing Rock has shown in its Motion no specific question or interest outside those presented by Three Affiliated Tribes. Its argument in the brief itself does not offer any resolution of issues not already argued in the brief of Three Affiliated Tribes.

Standing Rock claims that the decision of the North Dakota Court, if affirmed, may close the doors of the North Dakota Courts to tribal members and the tribe. (Motion of Amicus.) That interest is congruent to the interest of Three Tribes, and presents nothing new to this case.

In short, the brief of Standing Rock will not aid the Court and is but a useless act. It has not justified its filing of a brief under the rules; it has not met the requirements of the rules. Permission to file the brief as amicus should be denied.

Professional courtesy should not be the justification for proliferation of paper, and unjustifiable filing of briefs. Actions which will not advance the purpose and intent of the rules adopted by this Court should be prohibited.

Standing Rock ingeniously seeks to invent an issue which will not be addressed by all parties claiming "coercive jurisdiction" of the State Courts, particularly in regard to Wold's counterclaim against Three Tribes. (Brief of Amicus, pp. 5-10.) The position argued by Standing Rock is not consistent with Three Tribes's argument in the State Court. There, Three Tribes argued that the State Court could not assume jurisdiction over the counterclaim, but rather, Wold would be required to take its counterclaim to the Tribal Court. This position was flatly and justifiably quashed by the North Dakota Supreme Court during oral argument. (The tape of this proceeding is available in the Clerk of the North Dakota Supreme Court's office.)

Further, Standing Rock argues that due to the size and nature of the two claims, that no "coercive jurisdiction" can be asserted since if Wold is successful, its counterclaim would only amount to a setoff against Three Tribes's claim. (Brief of Amicus, p. 6, footnote 3.) This argument was also presented to the North Dakota Court and was rejected by that Court.

This argument is highly presumptuous and entirely without merit. Counsel for Wold does not pretend to be omniscient, and professes to having but limited experience in this world and certainly none in the next. However, even in that limited experience it is recalled that on at least one occasion a plaintiff lost absolutely on its case in chief, while at the same time a defendant prevailed entirely on its counterclaim. If Three Tribes fails in its efforts, and if Wold is successful, the jurisdiction of the North Dakota Supreme Court will be every bit as coercive as if Wold had taken upon itself to initiate the action. Surely the argument of Standing Rock will admit to this possibility, and once so admitting should be disregarded by the Court.

**B. An amicus has no standing to object to the jurisdictional consequences the amicus created for itself.**

The Constitution envisions legal proceedings to be conducted so as to guarantee fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310 (1945). The Constitution will not authorize gamesmanship, nor may a party justly play fast and loose with the judicial machinery. *U.S. v. Antelope*, 430 U.S. 641 (1977) (footnote 13); *DiFrischia v. New York Central Railway*, 279 F.2d 141 (3rd Cir. 1960). These statements are representative of the fundamental and traditional notions of justice expressed by this and other courts.

Standing Rock seeks to object to the holding of the North Dakota Court, and places an argument before this Court on the issues. The consequences of the North Dakota Supreme Court ruling are the result of Standing Rock's own making. For Standing Rock to now complain of the consequences it created would work to pervert those notions of evenhanded play suggested above.

After the passage of P.L. 280, North Dakota, a disclaimer state, was required to amend its constitution and pass affirmative legislation before assuming any subject matter jurisdiction. P.L. 280, Chapter 505 U.S. Statutes at Large 67, §6. Since the North Dakota legislature meets only once every two years, some time passed between passage of P.L. 280 and North Dakota state action. That action took place in 1958 and 1963. In 1963 the legislature enacted Chapter 27-19, NDCC. Prior to passage of that law, committee meetings were held. On January 21, 1963, a joint committee meeting of the State House and Senate State and Federal Government Committee met in Bismarck, North Dakota. Attending that meeting, and speaking on behalf of Standing Rock was Marvin Sonosky, their attorney. (Wold believes this Marvin Sonosky to be the same

Marvin Sonosky who is a member of the firm which represents Standing Rock today.) In speaking to that committee, Mr. Sonosky stated the bill proposed by North Dakota violated P.L. 280, and the morals of law. He told the North Dakota committee that jurisdiction under P.L. 280 was an all, or nothing at all proposition, and before North Dakota undertook to assume jurisdiction in Indian country the Indians affected should be allowed to vote on the issue. North Dakota Legislative History 1963, Chapter 27-19, NDCC. (Copies of this History are attached.)

The North Dakota legislature listened to Mr. Sonosky's recommendations and amended the proposed legislation giving Indians a voice in their own destiny. §27-19-02, NDCC. While the Indians, and specifically Standing Rock, asked for this protection not one tribe, and certainly not Standing Rock, has voiced its consent to state jurisdiction. Having asked for the consent provisions, and failing to then act accordingly, Standing Rock brought the consequences of the North Dakota decision upon itself. Standing Rock can hardly complain of those consequences now.

Standing Rock, through its attorney, Marvin Sonosky, told the North Dakota legislative committee that subject matter jurisdiction in Indian country was an all or nothing at all proposition. If this was a misconception in 1963, it was a misconception created by Standing Rock and its attorney. That the North Dakota Supreme Court relied upon this misconception created by Standing Rock and held that the State of North Dakota had no subject matter jurisdiction is an entirely foreseeable consequence. It is also a consequence of Standing Rock's own making. For Standing Rock to now petition this Court for permission to refute a line of North Dakota cases Standing Rock is arguably responsible for creating shows an inconsistency of reasoning and unfairly prejudices all non-Indian North Dakota residents who relied upon the conception.

Standing Rock has engaged in gamesmanship by its request for permission to this Court to join as amicus. Standing Rock, having created a rule of play which the North Dakota Courts adopted and followed for 20 years, now seeks to play fast and loose with that rule. This gamesmanship should not be allowed and Standing Rock's request for permission to join as amicus ought not be allowed.

## IX. CONCLUSION

Standing Rock has presented no new insights or facts in this case. The briefs of the parties and Solicitor General will clearly allow this Court to examine all relevant issues in this controversy. The filing of Standing Rock's amicus is, therefore, a useless act and ought to be prohibited.

Standing Rock has created a jurisdictional consequence. These consequences flow from the statements and representations it made to the North Dakota legislature 20 years ago. The Courts of North Dakota have relied upon these representations and acted accordingly. Standing Rock has taken no action to correct any consequences, or to work with the State of North Dakota to rectify these problems. Standing Rock may not now be heard to object to the consequences it caused.

Permission to file a brief as amicus curiae should be denied.

Respectfully submitted this 11th day of August, 1983

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## APPENDIX

### MINUTES OF THE JOINT COMMITTEE MEETING OF THE STATE HOUSE AND SENATE STATE AND FEDERAL GOVERNMENT COMMITTEE, JANUARY 21, 1963

A Joint Committee meeting of the House and Senate met today Monday, January 21st, 9:00 A.M. in the hearing room to hear opposition to SB30. Regarding an act accepting Civil jurisdiction over civil causes of action arising in Indian country and providing limitations thereon.

Roll called and a quorum was present in both House and Senate.

*Mr. Clif Jockim* read part 3 of the jurisdiction as layed out by Civil Law with regard to the Indian and his problems.

*Sen Longmire* opened hearing in opposition to SB30.

*Marvin Sonoski*, Attorney, 1700 K Street, Washington, D.C. represented the Standing Rock Indians, the Sioux tribe. He feels this bill would only extend rights of the State Civil jurisdiction. Said merchants wanted this bill so that they could collect deliquent debts. It violates morals of law. It would only cover civil and not criminal jurisdiction. Indians do not want bill passed. State should not have jurisdiction on reservations without Indians consent. If it had the clause of Indian Consent the Indians would be for it. Mr. Sonosky doubted the validity of the bill since it was for only 4 years. Public Law 280 of Congress states Civil and Criminal jurisdiction All or nothing at all. Said the Federal Gov't would probably step out of Indian Affairs if States are to take over and

wondered if the State can give the same schools, roads, education and care. Mr. Sonoski wants the Indian to be able to vote on this bill by ballot.

Sen. Longmire answered Mr. Sonoski, said the merchants were not involved in bill and that the LRC made the study with the help of the Tribes. It would not result in Federal Gov't pulling out of Indian Affairs. Other States that have law notice no lessening of Federal Gov't help.

*Rep. Leahy* asked how many other States have this jurisdiction? If this law would supercede other civil jurisdiction?

Mr. Sonoski answered 7 States, and yes this law superceded any other.

Mr. Sonoski said Standing Rock getting housing from Federal Gov't under SB30 they would not have status to apply for public housing. and said there was no public housing in N.D.

*Emerson Murray* LPC, said N. D. has had public housing since 1937. There was some in his own county of Rolette.

*Sen. Reichert,* How are domestic relations taken care of now?

Mr. Sonoski said State takes over now. Little if any Federal care

*Kenneth Moxness,* Ambross, N. D. Teacher said he felt this was a good bill. Sen Longmier stated that this hearing was for opposition but thanked him anyway.

*Theadore Jamerson,* Tribal officer of Standing Rock at Ft. Yates spoke for the tribe against SB30. Had a statement which he spoke from and then presented to the committee. Said Mr. Onsrude deceased, did much

to help Indians. He said the Indians at Standing Rock have their own tribal law whichcovers education, vocational placement and domestic relations. Said Indians want self respect free from Gov't control. Produced a progress report done on there own initative. Said Standing Rock courts far superior to County courts. Need for more reciprical agreement between State, Federal and Tribal law. Said they have had this tribal law since 1958 and it is working better than any other system. The Indians want to get away from Welfare and are becoming independent.

*Rep. Gackle,* Asked Jamerson if the Indians would want the $65,000. to be appropriated to them for vocational training.

*Mr. Jamerson* said no, the Indians did not need this help now as they had a livestock program and other way to make money.

*Sen. Longmier* asked if the tribes wern't at the LRC hearings.

Mr. Jamerson said at the 1962 meeting only 15 present and they met with county and Indians only on law and order. Nothing else mentioned.

Rep. Gackle, complimented Jamerson on wanted to stand on there own two feet but feels that it would hinder them not to accept Federal or State aid.

*Ruben Carlson,* Child welfare supervisor, Welfare Board, N.D. Stated that Standing Rock had no provisions for neglected children in their Tribal law. Mr. Jamerson said that they do now.

Rep. Reiten; asked who is going to pay for program for homeless children? Jamerson said Federal funds. Mr. Carlson said in July 1962, 149 Indian children in foster

homes. Now there is no means or jursidiction to find homes off the reservation.

*Sen. Longmire* asked if Indians want aid given to them from N. D.

*Mr. Sonoski* said Indian pay taxes now and are entitled to these aids.

*Emerson Murry* said State and Federal uncertain to their jursidiction with regard to welfare.

*Robert Lumberg*, Attorney, Child Welfare Asked Sonoski if their code had provision for prental rights. Sonoski said jursidiction with the State.

*Rep. Welder*, asked what is population on Standing Rock reservation?

Mr. Jamerson said 7010, Turtle Rock 6000.

*Les Ovre*, Director Social Welfare, who pays for children in foster homes. If child is placed offof reservation difficult for State to intervene, or procede with tribal action.

Mr. Jamerson said Federal Gov't pays. also, his tribe fixing up old home to accomodate 25-30 children

*Mr. Francis Cree*, Turtle Rock Tribal Chairman, Belcourt, N.D. His tribe rejects civil jurisdictionbecause Indians not asked if they were for this. Their code is open for amendments and would like to work with the state.

*Jefferson B. Smith, Jr.*, Ft. Berthoud reservation. Appearing on his own. Said U. S. expencts to much of Indians. Said in 1870 U.S. took away land more in 1880 then Garrison Res. more taken from Indian. All Indians skeptical of whites. They oppose SB30 It was not interperted to Indian and they want it explained to them. Said we acted Imperialisticly.

*Richard Cavanaugh,* St Michles Mission, Ft Totten in opposition. Carl Whitman, Attorney Ft. Berthoud tribal member. General consences on civil jurisdiction opposed. Said North Dakota makes same mistake as Federal Gov't. by not spending more than a few hours on reservation, should spend at least week, to see how Indian really lives. Indian not ready for Civil Jurisdiction. Garrison Dam project upset Indian badly economically and socially. Said 3/4 of reservation now used by non-Indian.

*Sen. Wartner* wondered if original treaty being avergated. If Indians are ready to govern selves.

Mr. Sonoski said yes treaty avergated. Initially Indian had jursidiction over whole territory and non-Indian. SB30 attacks Sovereign rights.

Rev. Case, State man for Indian reservation said we cannot generalize this blanket bill for all tribes. Each one Sovereign. Can make progress one tribe at a time.

*Sen Longmier* asked Mr. Sonoski if the Indians would want an election on the reservation to approve or respect SB30.

Mr. Sonoski said yes, It should be explained to them (the Indians).

All Indians at the hearing agreed this the democratic way.

Sen Longmier adjourned hearing.

Respectfully submitted Joyce Rouse, Secretary